December 5th, 1905.

Mr. Duer du Pont Breck,
Corresponding Sec'y. Mutual Life Ins. Co.,
New York City.

Dear Sir:-

Miss Aimee L. Tourgee, of Mayville, has handed me your letter of September 13th, concerning Policy 239865, upon the life of her father, the Honorable Albion W. Tourgee. In that letter you say that you will pay her $15,012.85 upon this policy for $15,000, because the additions are:"$381, post mortem dividend of $4, less three quarterly premiums of $372.15;" also that "$968 of additions were surrendered."

As a policy holder in your company, and a lawyer of many years' experience, I must say your letter, and the facts as they exist, disclose that your Company has been in the habit of robbing widows and orphans, and that Mr. Hughes still has much to do before the public will fully comprehend the extent to which the officers of your Company have filched from widows and orphans the moneys to which they are justly entitled. This language is strong language, but I am certain that no policy holder in your Company for one moment desires that your Company should practice any such unjust system as that disclosed in your letter. Not only is it unjust, but it is illegal, and, as an experienced life insurance official, you must be presumed to know there is no legal warrant, or moral warrant either, for what you propose in this particular case. If you are simply following your own precedents in all such cases, in this particular case comment is unnecessary, if, in fact, the law does not warrant what you propose. What are the facts and what is the law ?

March 30th, 1883, your Company issued Policy No. 239865 upon the life of Albion W. Tourgee, in favor of his wife, Emma K. Tourgee, upon conditions, the most important one here involved being as follows:

"1. The annual premium of Four hundred and eighty-four "Dollars and five Cents, shall be paid in advance to the Company, "at its Home Office in the City of New York, on the delivery of "this Policy, and thereafter on the thirtieth day of March in every "year during the continuance of this contract."

In consideration of an increased payment, to-wit: instead of $484.05 in a single advance annual payment, four quarterly payments of $124.05, your Company on March 26th, 1885, waived the advance annual payment, and, instead, entered into a written agreement for these increased advance quarterly payments, as appears by this written waiver and modification of the original policy, which is in words and figures as follows, to-wit:

"THE PREMIUMS on this Policy are hereby changed to 1/4 annual "payments, each of which being $124.05 will fall due on the 30" "days of March, June, Sep. & Dec. in each year hereafter.

"New York, March 26", 1885. (Name apparently) ISAAC F. LLOYD, Sec'y."

Increased quarterly payments have since been made upon this policy, under this waiver and modification. The policy has been duly assigned to Judge Tourgee's daughter, Aimee L. Tourgee. Judge Tourgee died May 21st, 1905. Proofs of loss were long since forwarded your Company. The questions of law that arise are: Has your Company the right to deduct from the amount to be paid his daughter, the three

quarterly premiums of $372.15 for the remaining quarters of the year when he was not living ? Has your Company also either the legal or moral right to pay over simply $15,012.85, without making any allowance whatever for interest, at any rate per cent whatever, although your Company has been receiving interest upon this money all the time, if its officers have done their duty and have not deposited the money without interest in some trust company in which they are interested, as it appears by evidence they so often do?

1.- As to the three quarterly payments which you are attempting to exact, where you have incurred no risk in consideration therefor, so far as I can find, the law has been unquestioned ever since it was first settled by Lord Mansfield more than a century ago. The law upon this subject as thus settled is thus sententiously stated by a leading authority upon life insurance:

"When, however, the contract is divisible, that portion of the pre-
"mium which may have been paid for the risk, not due, shall be re-
"turned, as when, in addition to the renewal premium a further pre-
"mium is paid for a license to proceed to any foreign place, should
"the assured remain in England and never incur the risk, the premium
"must be returned."

And in any case, it is the decision of Lord Mansfield-

"Where a premium has been paid but the risk has not been run, wheth-
"er this has been owing to the fault, pleasure, or will of the as-
"sured, or to any other cause, the premium shall be returned by the
"insurers."

But - "If the risk has once commenced, there shall be no apportionment
"or return of the premium afterwards."

Bliss on Life Insurance, Second Ed., Section 415, and cases.

Here, by your agreement of modification, you divided each year into four risks, of one quarter each, and provided for the payment in advance, of the premium for that quarter, as appears by our quotation of your modified agreement.

The principle that where the risk is thus divided by the Company, it cannot collect for the period of time during which it has incurred no risk, and if it has obtained a premium therefor it must return it, is of universal application. It has even been applied to cases of marine insurance, where, the risk being more difficult to measure, the courts are more inclined to hold with the Company and against the assured. For instance, in this state, in a leading case, Bronson, J., thus stated the law as far back as 1843:

"But the voyage was divisible into distinct risks, and a <u>particular</u>
"<u>premium</u> was to be paid for each; and no risk having been run as
"to the return voyage, the premium may be apportioned. . . . . They
"have thus, in effect, provided for two voyages or risks, with a
"specified premium for each. As the company has never run any
"risk on account of the return voyage, no part of the premium for
"that should be demanded. If the premium had been paid, it might
"have been recovered back."

This decision is expressly rested upon the language of Lord Mansfield in the life insurance case of Tyrie vs. Fletcher, Cowp. 666, which we have already quoted from Mr. Bliss.

Waters vs. Allen, 5 Hill, 421, 425.

I cannot find that these principles have ever been questioned

in this state. Instead, a life insurance company which undertook to defeat a recovery on the ground that a quarterly premium had not been paid, was met on its own proofs by the counterclaim that such proofs showed that the provision of the policy for the payment of an annual premium had been modified by a verbal agreement for the payment, instead, of four quarterly premiums; that the Company had been in the habit of accepting the quarterly premium from twenty days to five months after it was due, and, therefore, the failure to pay such quarterly premium twenty-three days after it became due, was not a defense to the policy, and in 1892 our Court of Appeals unanimously held such counterclaim good, and permitted the assured to recover of such insurance company.

De Frece vs. N.L.I.Co., 136 N. Y., 144, 150.

Certainly it must be presumed that you and your company are familiar with such principles of law, and, therefore, the strong language I have used with reference to your conduct in this matter is entirely justified, unless you can cite me to some decision of the courts of this state sustaining some immoral and unjust principle to overcome the authorities to which I cite you.

2.- As to the interest, you have sixty days after the receipt of proofs of loss, in which to pay, and thereafter the assured is entitled to six per cent interest from you for your failure to pay the amount due. I am not informed at this writing as to the exact date upon which you received the proofs of loss, but your files will show that fact. Since you received those proofs of loss, you have refused to pay the assured, except upon the condition that the assured permit you to make the deduction of three quarterly payments not earned, and to which

your company is not entitled. Because you have thus demanded from the assured what your company is not entitled to, morally or legally, it is plain, by every decision, that your company should pay six per cent interest to the assured upon the amount due on this policy, from sixty days after your receipt of proofs of loss. If you will at once send me a receipt for the amount due on the policy, with interest to the date of the receipt of this letter, I will instantly procure such receipt to be signed, and will forward it to you, with the policy for cancellation. Or, if you prefer, you can send a draft, with such a receipt attached, through any bank, and I will procure the assured to sign the receipt and will return the policy to you upon condition that the draft is delivered to me.

Respectfully yours,